

No. 15187

United States
Court of Appeals
for the Ninth Circuit

S. B. HUFFMAN, Trustee in Bankruptcy of
Charles Manfre Transportation Co., Bankrupt,
Appellant,
vs.

UNITED STATES OF AMERICA,
Appellee.

Transcript of Record

Appeal from the United States District Court for the
Northern District of California,
Southern Division.

FILED

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

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In the Southern Division of the United States District Court for the Northern District of California

No. 43,148—In Bankruptcy

In the Matter of

CHARLES MANFRE TRANSPORTATION CO.,
a Corporation,

Bankrupt.

PETITION FOR ORDER REQUIRING AS-
SERTED LIEN CLAIMANT TO PRO-
POUND CLAIM

Comes now S. B. Huffman, and respectfully represents:

That he is the duly appointed, qualified and acting Trustee of the estate of the above-named bankrupt;

That on or about March 2, 1954, Utility Trailer Sales Company of San Francisco took possession of four (4) used Utility Van Semi-Trailers, numbered 19308, 19309, 19310, and 19311, which equipment was being purchased by the bankrupt from said Utility Trailers Sales Company of San Francisco; that thereafter Van No. 19310 was sold to George Takehara and I. J. Joseph on April 16, 1954, by said Utility Trailer Sales Company of San Francisco for the sum of \$3,605.00;

That thereafter Vans Nos. 19308, 19309, and 19311 were sold to John Freitas Transfer on June

23, 1954, by said Utility Trailer Sales Company of San Francisco for the sum of \$11,643.75;

That on or about March 9, 1954, there was served on Utility Trailer Sales Company of San Francisco a document entitled "Levy", which document purported to be executed on behalf of the District Director of Internal Revenue, and purported to be notice that all property in the hands of the said Utility Trailer Sales Company of San Francisco and belonging to Charles Manfre Transportation Co., Inc., was seized and levied upon; that other than the service of said document no seizure, levy, or reduction to possession was made by or on behalf of said District Director of Internal Revenue so far as is known to your petitioner;

That on September 14, 1955, your petitioner filed a Petition for Turnover Order against Utility Trailer Sales Company of San Francisco, and thereafter, on October 24, 1955, this Court made its order that said Utility Trailer Sales Company of San Francisco pay over and deliver unto petitioner the total amount of \$2,309.49 in full settlement of the claim of your petitioner against said Utility Trailer Sales Company of San Francisco; that said order of this Court was made and entered pursuant to an agreement between counsel for your petitioner and counsel for Utility Trailer Sales Company of San Francisco, the effect of which agreement was that petitioner agreed to indemnify Utility Trailer Sales Company of San Francisco against having to

make duplicate payment of the same sums to the United States in response to said purported levy;

That these bankruptcy proceedings were commenced June 4, 1954; that said sum of \$2,309.49 has been paid to petitioner by said Utility Trailer Sales Company of San Francisco.

Wherefore, your petitioner prays that an order be made and entered herein directing the District Director of Internal Revenue Service, San Francisco District, to file and propound with the above-entitled Court for hearing and determination his verified claim of lien against, or interest in, said \$2,309.49 above-referred to, or for such other, further or different order or relief as to this Court may seem just in the premises.

Dated: October 26, 1955.

/s/ S. B. HUFFMAN,
Petitioner.

NEWMARK & STRONG,
By /s/ M. M. NEWMARK,
Attorneys for Petitioner.

Duly verified.

[Endorsed]: Filed November 1, 1955.

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE

Upon consideration of the annexed trustee's Petition for Order Requiring Asserted Lien Claimant

to Propound Claim, and good cause appearing therefor,

It Is Hereby Ordered that District Director, Internal Revenue Service, San Francisco District, be and he hereby is required to appear before Honorable Bernard J. Abrott, Referee in Bankruptcy, at his courtroom, Room 220, Post Office Building, Thirteenth and Alice Streets, Oakland, California, in said District, on the 7th day of December, 1955, at the hour of 11:00 a.m. of said day, to show cause, if any there be, why the prayer of said trustee's Petition should not be granted; and

It Is Hereby Further Ordered that District Director, Internal Revenue Service, San Francisco District, file his answer in writing with this Court, asserting such claim of lien or interest as he may have or assert in or to the sum of \$2,309.49 referred to in said trustee's Petition, or be forever thereafter barred from so asserting same, and that he serve a copy of said answer upon Newmark & Strong, the attorneys for said trustee, at 1001 Crocker Building, 620 Market Street, San Francisco 4, California, either personally or by mail at least five (5) days prior to the date set for the hearing of this Order to Show Cause; and

It Is Hereby Further Ordered that a copy of this Order to Show Cause, and of the Petition of said trustee herein referred to, be served upon said District Director, Internal Revenue Service, San Francisco District, at least ten (10) days before

the return day, either by the delivery thereof personally unto the said respondent, or by mailing a copy thereof to said respondent.

Dated: November 1, 1955.

/s/ BERNARD J. ABROTT,
Referee in Bankruptcy.

[Endorsed]: Filed November 1, 1955.

[Title of District Court and Cause.]

RESPONSE TO PETITION AND TO THE ORDER TO SHOW CAUSE

Comes now the United States of America and in answer to the petition for turnover order on file herein:

I.

Alleges that the following taxes were assessed against the bankrupt:

Type of Tax	Period	Amount Outstanding	Assessment List Received	Notice of Lien Filed
Transportation....	5/23	\$ 1,212.34	6/15/53	9/17/53
”	.... 2/52	413.26	8/31/53	12/24/53
”	.... 5/54	1,530.90	5/ 4/54	
”	.... 5/54	242.58	5/ 4/54	
Income.....	5/51	320.23	6/25/51	12/24/53
F.E.W.....	9/51	5,693.61	1/21/52	1/24/52
”	..... 4/52	1,890.49	5/ 5/52	6/12/52
”	..... 6/52	1,187.39	10/30/52	2/ 3/53
”	..... 3/52	1,374.86	6/29/53	10/ 2/53
”	..... 3/53	1,482.91	2/15/54	3/15/54
”	..... 4/53	467.80	2/15/54	3/ 8/54

\$15,816.37

Added to the above figure is the five per cent non-payment penalty and six per cent interest from date of assessment, resulting in the figure of \$18,457.57 referred to in the levy as the obligation of Charles Manfre Transportation Co., Inc.

The above-listed liens were reduced to possession on March 9, 1954, when a levy was served on Utility Trailer Sales Company by the District Director of Internal Revenue. Said levy demanded that all property, rights to property, moneys, credits and bank deposits in Utility Trailer Sales Company's possession belonging to Charles Manfre Transportation Co., Inc., be delivered to the District Director, to be applied on said taxpayer's indebtedness for the Federal tax liens. Inasmuch as the taxpayer was not adjudicated a bankrupt until June 4, 1954, the levy reduced the Federal tax liens to possession prior to bankruptcy in accordance with Section 67(c) of the Bankruptcy Act. *U. S. v. Eiland, Trustee*, 223 F. 2d 118.

II.

Alleges that the Trustee has no right, title or interest in the property previously seized by the District Director, and that the same is the sole property of the United States.

III.

Contends that this Court is without jurisdiction to determine whether or not the Utility Trailer Sales Company of San Francisco is liable to the United States under Section 3710 of the Internal

Revenue Code (1939), Title 26 U.S.C., for non-compliance with the levy in the event it does not direct the trustee to pay over to the District Director the sum levied upon.

Wherefore, having duly responded, United States of America prays:

1. That its claim as hereinbefore set forth be recognized as valid against and prior to the sum of \$2,309.49 held by the trustee herein.

2. That the trustee be directed to turn over the sum of \$2,309.49, which is the property of the United States.

LLOYD H. BURKE,

United States Attorney;

By /s/ CHARLES ELMER COLLETT,

Assistant United States

Attorney;

/s/ GEORGE MARISCAL,

Attorney, Office of Regional Counsel, Internal Revenue Service.

Receipt of copy acknowledged.

[Endorsed]: Filed January 17, 1956.

[Title of District Court and Cause.]

TURNOVER ORDER

The Court having issued an Order to Show Cause on the verified petition of S. B. Huffman, Trustee

of the above-named bankrupt estate, directing the District Director of Internal Revenue to propound his lien claim to the sum of \$2,309.49 paid to petitioner by Utility Trailer Sales Company, and the United States having filed the response thereto, and the same having come on regularly for hearing on the 18th day of January, 1956; and

The Court having received and considered the matter in evidence, and having heard M. M. Newmark, Esq., attorney for said Trustee, in support of said petition, and Lloyd H. Burke, Esq., United States Attorney; Charles Elmer Collett, Esq., Assistant United States Attorney; and George Mariscal, Esq., Attorney, Office of the Regional Counsel, Internal Revenue Service, on behalf of the United States of America and the Director of Internal Revenue, makes the following Findings of Fact:

(1) That prior to March 9, 1954, Manfre Transportation Company, Inc., was indebted to the United States for transportation, income, and withholding employment taxes in the sum of \$18,457.57. That statutory liens were filed in Santa Cruz County, the place of business of the above-named taxpayer, prior to March 9, 1954.

(2) That prior to March 9, 1954, Utility Trailer Sales Company of San Francisco, California, repossessed several trailers on a conditional sales contract to the above-named taxpayer; that on March 9, 1954, the United States of America by

and through its District Director of Internal Revenue did cause a levy to be made on said Utility Trailer Sales Company, directing that all property, rights to property, moneys, credits, and bank deposits in the possession of said Utility Trailer Sales Company belonging to Charles Manfre Transportation Co. be delivered to said District Director, to be applied on said Charles Manfre Transportation Co.'s indebtedness for Federal tax liens; that the obligation of the Utility Trailer Sales Company at the time said levy was served to said Charles Manfre Transportation Co. was \$2,309.49; that said obligation was not paid to the United States, but when the taxpayer was adjudicated a bankrupt July 4, 1954, the same was paid to the Trustee who now holds it.

From said findings, this Court concludes that the levy of the United States by and through its District Director of Internal Revenue on or about March 9, 1954, against Utility Trailer Sales Company for property belonging to Charles Manfre Transportation Co., effected a seizure of the obligation of \$2,309.49 on behalf of the same and reduced it to the possession of the United States; and that the Trustee herein is without any right, title or interest in said sum of \$2,309.49 paid on the obligation.

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed that the above-named Trustee turn over to the United States of America the sum of \$2,309.49, and that upon so doing he be discharged

from all further liability in connection with said sum of money.

Dated at Oakland, California, this 26th day of January, 1956.

/s/ BERNARD J. ABROTT,
Referee in Bankruptcy.

[Endorsed]: Filed January 26, 1956.

[Title of District Court and Cause.]

PETITION FOR REVIEW

To the Honorable Bernard J. Abrott, Referee in Bankruptcy:

The petition of S. B. Huffman, Trustee in Bankruptcy herein, respectfully represents:

(1) Your petitioner is aggrieved by the order herein of Bernard J. Abrott, Referee in Bankruptcy, dated January 26, 1956, a copy of which order is annexed hereto, marked Exhibit "A", and made a part hereof;

(2) The Referee erred in respect to said order in that:

(a) In the Findings of Fact it is stated (page 2, line 7) that on March 9, 1954, the United States of America by and through its District Director of Internal Revenue, did cause a levy to be made on said Utility Trailer Sales Company, whereas in truth and in fact on March 9, 1954, only a written notice of levy was served on Utility Trailer Sales

Company of San Francisco in the City and County of San Francisco, State of California;

(b) In the Findings of Fact is stated (page 2, line 17) that when the taxpayer was adjudicated a bankrupt July 4, 1954, the said obligation of \$2,309.49 was paid to the Trustee, whereas in truth and in fact the said sum was not paid to the Trustee until October 27, 1955, after hearings upon a petition filed by the Trustee for a Turnover Order and the granting of said petition and the issuance of a Turnover Order.

(c) The Findings of Fact fail to state the location of the trailers on March 9, 1954, although it was admitted in open court that on said date they were not in Santa Cruz County, State of California.

(d) The Order concludes (page 2, line 23) that the levy on or about March 9, 1954, against Utility Trailer Sales Company for property belonging to Charles Manfre Transportation Co., effected a seizure of the obligation of \$2,309.49 and reduced it to the possession of the United States. Said conclusion is erroneous and is contrary to law, as there was no accompaniment of such possession as is required by Section 67(c) of the Bankruptcy Act.

(e) The Order concludes (page 2, line 25) that the Trustee herein is without any right, title or interest in said sum of \$2,309.49 paid on the obligation. Said conclusion is erroneous and is contrary to law, as said sum is subject to a first payment

therefrom of the actual and necessary costs and expenses of preserving the estate of said bankrupt subsequent to the filing of the petition in bankruptcy as provided in Section 67(c) and Section 64(1) of the Bankruptcy Act.

Wherefore, your petitioner prays that said order be reviewed by a judge in accordance with the provisions of the Act of Congress relating to Bankruptcy, that said Order be reversed; that the Turnover Order be annulled and that your petitioner have such other and further relief as is just.

Dated: March 1, 1956.

/s/ S. B. HUFFMAN,
Petitioner,

By /s/ M. M. NEWMARK,
One of His Attorneys.

NEWMARK & STRONG,

By /s/ M. M. NEWMARK,
Attorneys for Petitioner.

[Endorsed]: Filed March 2, 1956.

[Title of District Court and Cause.]

REFEREE'S CERTIFICATE ON PETITION
TO REVIEW TURNOVER ORDER RELATIVE
TO CLAIM OF DISTRICT DIRECTOR
OF INTERNAL REVENUE

The undersigned, one of the Referees in Bankruptcy, in accordance with the provisions of Sec-

tion 39(a) (8) of the Bankruptcy Act, hereby certifies as follows:

I.

Preliminary Proceedings

On June 4, 1954, Charles Manfre Transportation Co., a corporation, filed a voluntary petition in bankruptcy. That on June 7, 1954, the said Charles Manfre Transportation Co., a corporation was adjudicated a bankrupt and the matter was referred to the undersigned as Referee in Bankruptcy to take such further proceedings as may be required by said Bankruptcy Act. That on June 25, 1954, Geo. Schipper of Watsonville, California, was duly appointed Trustee of said estate. That a vacancy having existed in the office of trustee by reason of the death of said Geo. Schipper, the undersigned caused notice to be sent to all creditors of said bankrupt estate for the purpose of electing or appointing a new trustee. That on the 27th day of August, 1954, S. B. Huffman of Santa Cruz, California, was duly appointed Trustee of said estate and ever since said date has been and still is the duly qualified and acting trustee of said estate.

That on November 1, 1955, S. B. Huffman, as trustee filed his Petition for Order Requiring Asserted Lien Claimant to Propound Claim and on the same date, pursuant to the prayer of said petition, the undersigned Referee issued an Order to Show Cause directing the District Director, Internal Revenue Service, to file his answer in writing

with this Court asserting such claim of lien or interest as he may have or assert in or to the sum of \$2,309.49 in the possession of said Trustee. (There is forwarded herewith as a part of this Certificate, Petition for Order Requiring Asserted Lien Claimant to Propound Claim filed November 1, 1955, and Order to Show Cause filed November 1, 1955.)

That on January 17, 1956, the United States of America filed its Response to Petition and to the Order to Show Cause. (There is forwarded herewith as a part of this Certificate Response to Petition and to Order to Show Cause filed January 17, 1956.)

II.

Statement of Question Presented

The order being reviewed directs the Trustee in Bankruptcy to turn over to the United States of America the sum of \$2,309.49.

III.

Hearing

At the time and place fixed for the hearing of Trustee's Petition and Order to Show Cause and United States of America's Response thereto, it was stipulated by and between Milton Maxwell Newmark, Esq., on behalf of said Trustee, and George Mariscal, Esq., on behalf of the United States of America and the Director of Internal Revenue, that the matter be submitted upon an

agreed statement of facts. (The agreed statement of facts together with oral statements of respective counsel are contained in Transcript of Proceedings, filed March 28, 1956, and forwarded herewith as a part of this Certificate.)

That on January 26, 1956, the undersigned Referee in Bankruptcy made a Turnover Order directing the Trustee to turn over to the United States of America the sum of \$2,309.49. (The original Turnover Order filed January 26, 1956, is forwarded herewith as a part of this Certificate.)

IV.

Review

That on March 2, 1956, and within the time allowed by law, S. B. Huffman, Trustee of said estate, filed his Petition for Review. (The original Petition for Review, filed March 2, 1956, is forwarded herewith as a part of this Certificate.)

Dated at Oakland, California, this 12th day of April, 1956.

Respectfully submitted,

/s/ BERNARD J. ABROTT,
Referee in Bankruptcy.

[Endorsed]: Filed April 12, 1956, Referee.

[Endorsed]: Filed April 13, 1956, U.S.D.C.

In the District Court of the United States for the
Northern District of California, Southern Division
No. 43148

In the Matter of
CHARLES MANFRE TRANSPORTATION CO.,
a Corporation,

Bankrupt.

ORDER

The Order, Judgment and Decree of the Referee in Bankruptcy in the above-entitled action, dated January 26, 1956, is hereby affirmed.

The Findings of Fact made by the Referee in Bankruptcy in his Order of January 26, 1956, are hereby approved and adopted by this Court as its Findings of Fact.

The levy by the United States on March 9, 1954, on the Utility Trailer Sales Co. of San Francisco effected a seizure of the obligation of \$2,309.49 due to the Charles Manfre Transportation Co., a corporation, and reduced it to the possession of the United States. U. S. v. Eiland, 4 Cir., 223 F. 2d 118. When said Charles Manfre Transportation Co. was adjudicated a bankrupt on June 7, 1954, the Trustee in Bankruptcy appointed in said proceedings acquired no rights to said sum of \$2,309.49 as against the United States.

Dated: May 16, 1956.

/s/ O. D. HAMLIN,

United States District Judge.

[Endorsed]: Filed May 16, 1956.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To Lloyd H. Burke, United States Attorney, and to
the United States of America, Respondent
Herein:

Notice Is Hereby Given that S. B. Huffman,
Trustee in Bankruptcy herein, hereby appeals to
the United States Court of Appeals for the Ninth
Circuit from the Order of this Court entered on
May 16, 1956, which affirmed the Turn Over Order
of the Referee in Bankruptcy, dated January 26,
1956.

Dated this 25th day of May, 1956.

/s/ MILTON MAXWELL
NEWMARK,

/s/ PAUL E. ANDERSON,
Attorneys for Appellant, S. B. Huffman, Trustee
in Bankruptcy.

[Endorsed]: Filed May 25, 1956.

In the Southern Division of the United States District Court, for the Northern District of California

No. 43148

In the Matter of

CHARLES MANFRE TRANSPORTATION CO.,
a Corporation,

Bankrupt.

Before Honorable Bernard J. Abrott, Referee in
Bankruptcy.

TRANSCRIPT OF PROCEEDINGS

January 18, 1956—11:00 A.M.

The Referee: Charles Manfre Transportation.

Mr. Newmark: Now, if the Court please, this is a controversy between the District Director of Internal Revenue and the Trustee in Bankruptcy of Charles Manfre Transportation Company as to the sum of \$2,309.49, which sum is now in the possession of such Trustee in Bankruptcy. This sum represents the proceeds received by the Trustee in Bankruptcy from Utility Trailer Sales Company of San Francisco as a result of *an made* after several days' hearing before your Honor. I might ask Mr. Mariscal, are all your assertions of right and claim set forth in your responsive pleading?

Mr. Mariscal: By right and claim you mean—

Mr. Newmark: Specifically, did the United States in addition to the levy which was alleged in here, did the United States record—

Mr. Mariscal: Yes, they're recorded. There is

notice of lien filed right on the claim there for your Federal employment withholding, 6/12/52, 1/24/52. That's the date that the liens were filed in the County Recorder's office.

Mr. Newmark: In what county?

Mr. Mariscal: In the particular county. Watsonville would be Santa Cruz County, wouldn't it?

Mr. Newmark: In other words——

Mr. Mariscal: These are the dates that they were filed in [1*] the particular county where Manfre Transportation was doing business at Watsonville and I don't recall the county seat—it would be——

Mr. Newmark: I think Santa Cruz County.

The Referee: It's either Santa Cruz or Monterey.

Mr. Newmark: Watsonville, Santa Cruz. Were any of these liens recorded in either San Francisco County or Sacramento County?

Mr. Mariscal: Not to my knowledge. Recorded Santa Cruz County, Santa Cruz. This is No. 536070-72.

Mr. Newmark: I might say I checked in San Francisco County but as you appreciate those things are in such a horrible mess I can't say positively I couldn't find any.

Mr. Mariscal: These are copies of Federal liens filed; they're all in Santa Cruz.

Mr. Newmark: All in Santa Cruz County.

Mr. Mariscal: Santa Cruz, Santa Cruz, recorded in Santa Cruz, Santa Cruz, Santa Cruz, all of them.

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

Mr. Newmark: All right, all in Santa Cruz.

Mr. Mariscal: Santa Cruz.

Mr. Newmark: Thanks. The point of time in which we are interested is 3:05 p.m. on March 9, 1954, at which time a Treasury Department Form 68(a), which is entitled "Levy" was served upon the Utility Trailer Sales Company of San Francisco and it was served in San Francisco. Now, I will offer this in evidence as the Trustee's Exhibit A or 1. [2]

The Referee: No. 1.

(The document referred to was received in evidence by the Referee and marked Trustee's Exhibit No. 1.)

TRUSTEE'S EXHIBIT No. 1

Form 668-A

U. S. Treasury Department

Internal Revenue Service

Levy

United States of America,
San Francisco Collection District,
State of California.

To Utility Trailer Sales Co. of San Francisco,
John N. Baird, Jr., President,
At San Francisco, California.

You are hereby notified that there is now due, owing, and unpaid from Charles Manfre Transpor-

tation Co., Inc., 720 Walker Street, Watsonville, California, to the United States of America the sum of Eighteen Thousand Four Hundred Fifty-seven and 57/100 dollars (\$18,457.57) as and for an internal revenue tax.

You are further notified that all property, rights to property, moneys, credits and/or bank deposits now in your possession and belonging to the aforesaid taxpayer and all sums of money owing from you to the said taxpayer are hereby seized and levied upon for the payment of the aforesaid tax, together with penalties and interest, and demand is hereby made upon you for the amount necessary to satisfy the liability set forth above from the amount now owing from you to the said taxpayer, or for such lesser sum as you may be indebted to him, to be applied in payment of the said tax liability.

Dated at Watsonville, California, this 2nd day of March, 1954.

GLEN T. JAMISON,
District Director of
Internal Revenue,

By /s/ REMO N. CIPOLLA,
Supervising Group Chief
Collections.

This Levy Served By Joseph L. Rasman, IRA,
CO.

Date 3/9/54; Time 3:05 p.m..

Received in evidence January 18, 1956.

Mr. Newmark: Now, at the date and at the time of that levy, as set forth in the verified petition of the Trustee, there were four used utility vans, semi-trailers, which vans had been purchased prior thereto from the Utility Trailer Sales Company and which vans——

The Referee: Is that the bankrupt?

Mr. Newmark: Purchased by the bankrupt from the alleged garnishee and prior to the date of that levy, which vans—the four vans were got into the possession of the alleged garnishee. These four vans remained in the garnishee's possession until a date subsequent to the date of the levy. As to some of them, April 16, and as to some of them, June 23, so that at the date and time of the levy, the vans were in the possession of the garnishee. If it becomes relevant, I would ask leave to introduce documentary evidence as to the date of the title of those vans at that time as reflected by the records of the Motor Vehicle Department. It is my opinion that Utility Trailer Sales Company was shown as the legal owner and the bankrupt as the registered owner but that evidently the vans were physically in the possession of the alleged garnishee at the time of the levy. The principal place of business of the alleged garnishee is the City and County of San Francisco. These vans were either at the moment of levy in San Francisco or in Sacramento. We [3] have been unable to establish definitely that they were at this time. If it becomes relevant, we can establish exactly where they were. At any event, they were not at either Santa Cruz County or

Monterey County. They were either in the Utility Trailer Sales yard in Sacramento County or they were in their yard or Bayshore property in San Francisco County. Other than the levy—of the alleged levy—the service upon a representative of the alleged garnishee of that notice, nothing further was done as far as the alleged garnishee is concerned. At the moment of the alleged levy, there was a question—a debatable question as to whether any amount ever was due to the bankrupt from the garnishee. Subsequently——

The Referee: Pardon me, Mr. Newmark, a part of your remarks the Court construes as factual and in another part of your remarks are in the nature of a contention of the Trustee. Now, before I can intelligently follow——

Mr. Newmark: You want to know what I am saying.

The Referee: I want you and Mr. Mariscal, if you can stipulate as far as the facts are concerned.

Mr. Mariscal: I will stipulate as far as the facts are concerned as to this: That the trailers were purchased by Manfre Transportation, that they were purchased from Utility Trailer Sales, that the trailers were not in Santa Cruz County on March 9, 1954, when we served our levy, and now about the legal ownership as to the state, I am not sure that it has any bearing. [4]

Mr. Newmark: I'm not either.

Mr. Mariscal: And furthermore, I don't know——

The Referee: It doesn't matter to the Court.

Mr. Mariscal: It doesn't matter. Which in effect are the facts he has gone through except for the legal ownership.

The Referee: Except one other item. And Mr. Newmark, you will stipulate that the Internal Revenue Department recorded——

Mr. Newmark: Oh, yes, sir, Mr. Mariscal said they did.

The Referee: In Santa Cruz.

Mr. Mariscal: In Santa Cruz their liens were recorded where the man was doing business.

The Referee: Now, where else do we need facts?

Mr. Mariscal: That's about the size of it.

Mr. Mariscal: Plus the date of the bankruptcy, which was subsequent to the levy, which was June 4, 1950.

The Referee: June 4, 1950. Would you gentlemen be concerned about the place of business of the bankrupt in your stipulation?

Mr. Newmark: If Mr. Mariscal wishes, we will stipulate that he did business in Santa Cruz County.

Mr. Mariscal: In Watsonville.

Mr. Newmark: In Watsonville.

Mr. Mariscal: Because all his notices and everything were published in the Watsonville newspaper and we have those here.

The Referee: The petition in bankruptcy says "the petition of Charles Manfre Transportation Company, a corporation, [5] residing at"—that's

exactly the way it says—"residing at Fort and Wall Streets in Watsonville, County of Santa Cruz."

Mr. Mariscal: Right.

Mr. Newmark: I would like counsel to stipulate to one additional fact which I mentioned here, that other than the service of the purported notice of levy upon Utility Trailer Sales Company, the Collector did nothing further with respect to Utility Trailer Sales Company.

Mr. Mariscal: By that, you are referring to reducing the intangible to possession.

Mr. Newmark: Well, whatever it was. You took no further action with respect to them.

Mr. Mariscal: No, that's all we did.

Mr. Newmark: That's all you did.

Mr. Mariscal: We served them with a levy and that certified receipt of the levy, the date of the exhibit, you offered into evidence.

Mr. Newmark: Fine. Those are the facts, your Honor. [6]

* * *

The Referee: Gentlemen, will you each stipulate that the petition in bankruptcy and the order of adjudication be considered a part of the factual record?

Mr. Newmark: Certainly.

Mr. Marascal: Certainly.

The Referee: Very well.

[Endorsed]: Filed March 28, 1956.

[Title of District Court and Cause.]

ARGUMENT ON PETITION FOR REVIEW

Monday, May 7, 1956

The Clerk: In re Charles Manfre.

Mr. Anderson: May it please the Court, this is a hearing on a petition for review of an order of the Referee in Bankruptcy. In the main it involves the effectiveness of a levy which was served by the United States of America, and in checking the records before your Honor we notice that the levy is not part of the record.

This levy was introduced into evidence before the Referee as Exhibit No. 1. I wonder whether counsel for the Government would stipulate that it become a part of the record before your Honor on review?

Mr. Greaves: So stipulated.

* * *

The Court: The matter may be submitted.

[Endorsed]: Filed June 28, 1956.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing and accompanying documents and exhibit, listed below,

are the originals filed in the above-entitled case and that they constitute the record on appeal herein as designated by the attorneys for the appellant:

One Complete File and Exhibit No. 1.

Transcript of Proceedings.

Transcript of Argument for Petition on Review.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 2nd day of July, 1956.

[Seal] C. W. CALBREATH,
Clerk,

By /s/ WM. J. FLINN,
Deputy Clerk.

[Endorsed]: No. 15187. United States Court of Appeals for the Ninth Circuit. S. B. Huffman, Trustee in Bankruptcy of Charles Manfre Transportation Co., Bankrupt, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed July 2, 1956.

Docketed July 11, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 15187

S. B. HUFFMAN, Trustee in Bankruptcy in the
Matter of CHARLES MANFRE TRANS-
PORTATION CO., a Corporation, Bankrupt,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

STATEMENT OF POINTS TO BE RELIED
UPON AND DESIGNATION OF RECORD

Pursuant to Rule 17(6) of the Rules of Practice of this Court, appellant states the points on which it intends to rely and designates the portion of the record for printing which appellant deems material to the consideration of the appeal.

Statement of Points

1. The court below erred in finding (page 2, line 7, Referee's Findings of Fact adopted by court below) that on March 9, 1954, appellee caused a levy to be made on Utility Trailer Sales Company, whereas in truth and in fact appellee served only a written notice of levy on Utility Trailer Sales Company on that date.

2. The court below erred in finding (page 2, line 17, *ibid.*) that when the taxpayer was adjudicated

a bankrupt July 4, 1954, the obligation of \$2,309.49 was paid to appellant, whereas in truth and in fact the said sum was not paid to appellant until October 27, 1955, after hearings upon a petition filed by the Trustee for a Turnover Order, the granting of said petition and the issuance of a Turnover Order.

3. The court below erred in finding (page 2, line 14, *ibid.*) that the obligation of the Utility Trailer Sales Company at the time said levy was served to the taxpayer was \$2,309.49, whereas in truth and in fact no liquidated sum of money was presently owing by Utility Trailer Sales Company to the taxpayer at the time of levy nor was it possible to determine at that time whether any amount would ever become due; the amount and the existence of the obligation of Utility Trailer Sales Company were not determined until October 27, 1955, after hearings upon a petition filed by appellant for a Turnover Order, the granting of said petition and the issuance of a Turnover Order.

4. The court below erred in concluding (line 23, Order of court below dated May 16, 1956) that the levy on or about March 9, 1954, against Utility Trailer Sales Company for property belonging to the taxpayer effected a seizure of the obligation of \$2,309.49 and reduced it to the possession of the United States. Said conclusion is erroneous and is contrary to law as the levy was not accompanied by possession as required under Section 67c of the Bankruptcy Act.

5. The court below erred in concluding (line 28, Order of court below, dated May 16, 1956) that when the taxpayer was adjudicated a bankrupt on June 7, 1954, appellant, appointed as trustee in bankruptcy in the proceeding, acquired no rights to the said sum of \$2,309.49 as against appellee. Said conclusion is erroneous and contrary to law, as said sum is subject to a first payment therefrom of the actual and necessary costs and expenses of preserving the estate of the bankrupt subsequent to the filing of the petition in bankruptcy and prior wage claims as provided in Section 67c and Section 64(a) of the Bankruptcy Act.

* * *

Dated: This 10th day of July, 1956.

/s/ MILTON MAXWELL NEWMARK,

/s/ PAUL E. ANDERSON,

Attorneys for Appellant, S. B. Huffman, Trustee
in Bankruptcy.

Affidavit of Service by Mail attached.

[Endorsed]: Filed July 11, 1956.